1979

Road Runner Inn, Inc. and Harold M. Smithson v. Douglas C. Merrill and Colleen B. Merrill : Respondent's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

ROAD RUNNER INN, INC., and
HAROLD M. SMITHSON,

Plaintiffs-Appellants,

vs.

DOUGLAS C. MERRILL,

Defendant, and

COLLEEN B. MERRILL,

Defendant-Respondent.

Case No. 16374

RESPONDENT'S BRIEF

Appeal from Third Judicial District Court
of Salt Lake County, The
Honorable James S. Sawaya, Judge

DALE R. KENT, ESQ.
Attorney for Defendant-Respondent
Colleen B. Merrill
660 South 2nd East, Suite 100
Salt Lake City, Utah 84111

W. Waldan Lloyd, Esq.
NIELSEN, HENRIOD, GOTTFREDSON
& PECK
Attorneys for Plaintiffs-Appellants
410 Newhouse Building
Salt Lake City, Utah 84111

Roger S. Baylock, Esq.
MORRIS AND BLAYLOCK
Attorneys for Defendant-Respondent
Douglas C. Merrill
520 Kearns Building
Salt Lake City, Utah 84101

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Attorneys for Plaintiffs-Appellants
410 Newhouse Building
Salt Lake City, Utah 84111

Roger S. Baylock, Esq.
MORRIS AND BLAYLOCK
Attorneys for Defendant-Respondent
Douglas C. Merrill
320 Kearns Building
Salt Lake City, Utah 84101

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Defendant-Respondent.	*	

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This appeal petitions the Court to affirm the conveyance from Defendant Douglas C. Merrill of his interest in the family home and real property to Defendant-Respondent Colleen B. Merrill, as conclusive against Plaintiff-Appellants Road Runner Inn, Inc., and Harold M. Smithson on the grounds that being part of the settlement of the divorce action between the grantor and grantee, the conveyance was for a fair consideration.

DISPOSITION IN THE LOWER COURT

On February 27, 1976, Defendant-Respondent, Colleen B. Merrill, (Respondent Colleen Merrill) sued Defendant, Douglas C. Merrill, (Defendant Douglas Merrill) for divorce in the Third Judicial District Court, Salt Lake County, State of Utah, Civil No. D 21418. Respondent Colleen Merrill, alleged extreme mental cruelty. On April

12, 1976, the Merrills entered into a Stipulation and Property Set-
tlement. Defendant Douglas Merrill agreed, inter alia, to convey
his interest in the family home and real property to Repondent Col-
Merrill. Pursuant to the Stipulation, Defendant Douglas Merrill
executed a quit-claim deed conveying any and all of his interest i
the family home and real property to Respondent, Colleen Merrill.
June 21, 1976, the Honorable Marcellus K. Snow, Judge, entered the
Interlocutory Decree of Divorce in the action and therein approved
the property settlement.

On June 30, 1976, Plaintiff-Appellants Road Runner Inn,
(Appellant Road Runner) and Harold M. Smithson, (Appellant Smithson
sued Defendant, Douglas Merrill and Respondent, Colleen Merrill, i
the Third Judicial District Court, Salt Lake County, State of Utah
Civil No. 236092, for breach of a construction contract. Appellant
Road Runner and Smithson alleged damages in the amount of $28,300.
and, naming Respondent Colleen Merrill as a Defendant, asked that
conveyance from Defendant to Respondent be set aside.

On October 6, 1976, Appellants filed a Motion to Interve
in the divorce action between the Merrills. Distressed, Respondent
Colleen Merrill, yielded to Appellants' demanded Stipulation that
Judgment and Decree of Divorce not be conclusive against Appellants
to the fairness of the consideration for the conveyance. The divor
court approved the stipulation and issued the final Judgment and De-
cree.

On August 15, 1978, in the breach of contract action, the
Honorable James S. Sawaya, Judge, awarded Appellants judgment aga-

Defendant, Douglas Merrill, in the amount of $28,300.00. The learned Jurist concluded, however, that the conveyance from Defendant, Douglas Merrill, of his interest in the family home to Respondent, Colleen Merrill, "being part of the settlement of the divorce action between grantor and grantee, was for a fair consideration." (Amended Conclusion of Law, No. 5) Respondent, Colleen Merrill, was granted a judgment of no cause of action and was dismissed. (Amended Conclusion of Law, No. 7)

RELIEF SOUGHT ON APPEAL

Respondent, Colleen Merrill, pleads the Court to affirm the conclusion of the trial court that the conveyance from Defendant, Douglas Merrill, of his interest in the family home and real property, being part of the settlement of the divorce action between the grantor and grantee, was for a fair consideration.

STATEMENT OF FACTS

In 1965, Defendant, Douglas Merrill, and Respondent, Colleen Merrill, then his wife, received a vacant lot located at 2341 Neffs Lane, Salt Lake City, Utah, as a gift from C.L. Merrill, Defendant's father. Defendant and Respondent both possessed substantial construction skills, learned in their youths from working alongside their fathers. As newlyweds, the Merrills had refined their skills through six(6) years of building churches throughout the United States. Respondent had taught women in Relief Society how to lay floors, hang ceiling tile and insulate buildings. The Merrills, accordingly, decided to build their own home together upon the property they had been given.

For two(2) years, Respondent, Colleen Merrill, labored in de-

signing and constructing for her growing family their first home. Her efforts never flagged. During six(6) months when Defendant, D. Merrill, was hospitalized, Respondent hung sheet rock, laid floor t. tiled the roof, painted the interior and exterior, completed the f. work and landscaped the 55' x 165' lot. The church supported the f. ily; Defendant could not provide. On March 11, 1967, the Merrills a their three(3) children were able to move into the home.

Although talented as a builder, Defendant Douglas Merril lacked the financial acumen to manage the family's resources. Mate ials used in constructing the home were obtained on credit; unbeknc to Respondent, Colleen Merrill, creditors were not paid. Several o the accounts went to judgment. It became necessary to borrow agai the equity in the home.

In 1968, American Savings loaned $13,000.00 against a twenty(20) year first deed of trust. $4,300.00 was used to retire debt for plumbing supplies owed to Respondent's father; $1,000.00 went to the friend in whose name the $13,000.00 loan had been obtai because Defendant, Douglas Merrill, had such a poor credit rating judgment liens were cleared; hospital bills were paid; the balance purchased a 1967 Thunder Bird and new furniture. New judgments ar

In 1973, Murray First Thrift loaned $15,000.00 against a six(6) year second deed of trust. Judgments were paid with part o the money; the balance purchased a 1973 Thunderbird and an 18 foot Starfire boat. Defendant Douglas Merrill defaulted on the loan.

On February 10, 1976, Clarence J. Bowden, Respondent's f loaned $3,310.00 against a third deed of trust. The money was us

reinstate the Murray First Thrift second deed of trust following notice of foreclosure. New judgments remained unpaid.

In 1968, the year after Respondent had completed the constuction of the family home, Respondent began working in order to help support the family. Her wages from Warshaw's, Skagg's, and ZCMI were small, in 1972, she obtained her real estate license. She worked for ARMS as a commissioned, self employed saleswoman until January 1975, when family and marital problems clamored for her attention. Without Respondent's income, the Merrill family struggled to survive. The church provided support; the Merrills purchased food with food stamps. Beleagured by Defendant, Douglas Merrill's improvident impecienities, Respondent Colleen Merrill, returned again to work in 1976.

On February 27, 1976, Respondent filed for divorce from Defendant Douglas Merrill on the grounds of mental cruelty. On April 12, 1976, the Merrills entered into a Stipulation and Property Settlement. Defendant Douglas Merrill agreed, inter alia, to convey his interest in the family home to Respondent, Colleen Merrill.

The home appraised for $38,000.00. First, second and third deeds of trust encumbered the home in the total amount of $26,348.00. Outstanding judgments amounted to $1,540.00. The unencumbered equity, therefore, amounted to $10,112.00. Respondent, as a joint tenant had an interest valued at $5,056.00; Defendant's interest was also valued at $5,056.00. Defendant, Douglas Merrill, was entitled to claim out of his undivided one-half(½) joint tenancy interest, a homestead exemption amounting to $6,700.00 ($4,500.00 head of family; $1,500.00 as spouse; $1,200.00 two other members of family). The $6,700.00

homestead exemption exceeded the $5,056.00 equity to which Defenda
was entitled. Thus the quit-claim deed which Defendant executed pu
suant to the Stipulation and Property Settlement conveyed an inter
in property to Respondent which was beyond the reach of creditors
of record. Respondent, however, was not aware that Defendant had
paid the materialmen and sub-contractors on the Road Runner constr
project begun March 17, 1975. As grantee, Respondent believed she
fairly settling divorce matters with Defendant.

The trial court wisely concluded that the conveyance by
claim deed from Defendant Douglas Merrill of his interest in the fa
home and real property to Respondent Colleen Merrill being part of
settlement of the divorce action between the grantor and grantee,
for a fair consideration. The decision of the trial court should
affirmed.

ARGUMENT

THE EVIDENCE SUSTAINS THE CONCLUSION OF THE TRIAL COURT THAT THE CONVEYANCE FROM DEFENDANT, DOUGLAS MERRILL, OF HIS INTERES IN THE FAMILY HOME AND REAL PROPERTY TO RESPONDENT, COLLEEN MERRILL BEING PART OF THE SETTLEMENT OF THE DIVORCE ACTION BETWEEN THE GRA AND GRANTEE, WAS FOR A FAIR CONSIDERATION.

The award of the home to Respondent, Colleen Merrill, so
she would have the benefit and use thereof in providing for the chi
was fair, reasonable, and equitable, and well within the comparati
wide latitude of discretion that the Utah Supreme Court has always
recognized the trial court should have in such matters. Ciraulo v.
Ciraulo, 576 P2d 884 (Utah 1978). In Ciraulo, the divorced wife re
ceived $9,000.00 equity in a home valued at $30,000.00. The trial
findings recited, "... there were periods of time during their mar

when the defendant failed to make any payments to support... the (wife) and the minor children" Accordingly, the trial court found it:

> reasonable and proper that the court award to the (wife) in lieu of any such claim the equity that the parties have in said real property and that therefore the real property should be awarded to the (wife) free and clear of any claim of the defendant, and subject only to the outstanding indebtedness thereon". (Utah Supreme Court's emphasis)

In the case at bar, not only did Respondent, Colleen Merrill, have a complaint against Defendant, Douglas Merrill, for his failure during their marriage to support her and their minor children. She could also claim to have benefitted Defendant by the thousands of dollars worth of labor she expended in building the house.

The Court historically has recognized the value of a wife's expenditures on her husband's behalf. In Lund v. Howell, 67 P2d 215 (Utah 1937), the Court refused to set aside an assignment of an undivided interest in an estate as a fraud upon creditors of the husband. There, the wife had spent $4,000.00 of her own money in building a house in Salt Lake City. The home was thereafter mortgaged and substantial amounts of the proceeds were advanced to pay the husband's debts in Idaho. The wife did not know that her husband was unable to pay his bills. In 1928, creditors obtained judgments against the husband amounting to $4,881.00. In 1930, he became an heir to an estate. He assigned his interest to his wife. The creditors attacked the assignment, challenging the wife's good faith and the sufficiency of the consideration she had given for the assignment. The Court upheld the assignment, relying upon definite documentary evidence that

the funds received from the mortgage of the house in which she had invested her own money had gone directly for payment of the husband's debts.

Here, the labor Respondent, Colleen Merrill, invested became the equity against which Defendant, Douglas Merrill, borrowed to provide for the family. Defendant's conveyance to Respondent merely returned to her a part of the value she had created. The conveyance scarcely discharged Defendant's ill-performed duty to support Respondent and their minor children. It was clearly within the divorce court's prerogative to make whatever disposition of property it deemed fair, equitable and necessary for the protection and welfare of the parties. English v. English, 565 P2d 409 (Utah 1977); Naylor v. Naylor, 563 P2d 148 (Utah 1977); Pearson v. Pearson, 561 P2d 1080 (Utah 1977); Baker v. Baker, 551 P2d 1263 (Utah 1976).

A. WHILE THE CONVEYANCE BETWEEN DIVORCING SPOUSES MIGHT BE SUBJECT TO STRICT SCRUTINY, NONETHELESS, THE TRANSACTION IS NOT NECESSARILY INVALID, AND THE TRUE FACTS ARE SUBJECT TO PROOF.

Appellants object to the trial court's conclusion that the conveyance, "being part of the settlement of the divorce action between the grantor and grantee, was for a fair consideration." Appellants correctly state the proposition that any conveyance between relatives is subject to rigid scrutiny. Divorcing spouses connot be denominated relatives. Appellants admit on page fourteen(14) of Appellants' Brief that;

> no case has been found which specifically holds a conveyance to be fraudulent under facts identical to those in the case at bar.

Appellants attempt, however, to weave an argument from the shreds

of familially dissimilar fact patterns to save their case. Their attempt must fail.

The case at bar concerns neither a conveyance between brothers, Smith v. Popham, 513 P2d 1172 (Oregon 1973), nor a conveyance between parent and child, Ned J. Bowman Co. v. White, 13 U2d 173, 369 P2d 962 (1962); Givan v. Lambeth, 10 U2d 287, 351 P2d 959 (1960); Peterson v. Peterson, 112 Utah 554, 190 P2d 135 (1948). Defendant, Douglas Merrill, conveyed his interest in the family home to Respondent, Colleen Merrill, pursuant to a court-approved property settlement in the divorce action she brought against him; the familial relationship was over.

The case at bar concerns neither a conveyance for which the consideration was support of the grantor, Brain v. Gould, 46 Ill. 293 (1867), nor a voluntary conveyance by which the grantor secured to himself a continuing financial benefit by relieving himself of the burden of supporting his wife in the future, Detroit Security Trust Co v. Gitre, 254 Mich. 66, 235 NW 884 (1931); Augurgh v. Lydston, 117 Ill. App. 574 (1905). Respondent will not support Defendant; Defendant will not be relieved of his duty to support his minor children and their mother.

The case at bar does not concern a conveyance from a husband made in consideration of the wife's forbearance in pursuing a meritorious divorce action, National Surety Co. v. Wittich, 184 Minn. 44, 237 NW 590 (1931); First National Bank of Fairbanks v. Enzler, 537 P2d 517 (Alaska 1975); Oppenheimer v. Collins, 115 Wis. 283, 91 NW 690 (1902). Even when Appellants intervened, Respondent, Colleen Merrill, refused to be deterred in her suit for divorce from Defendant, Douglas Merrill.

The case at bar does resemble Lieberman v. Kelso, 354 S. 137 (Fla App 1978). In that case, the husband conveyed his entire interest in the family home to the wife pursuant to a judgment of dissolution of marriage. The wife was "not aware of the existence of appellant's judgment against the husband at the time of the div The court upheld the conveyance noting, in passing, that the arm's-length nature of the transaction was further buttressed by the fac that the settlement agreement required the wife to convey her inter in certain other property to the husband. Lieberman is significant because the court believed, in essence;

> that the transfer of the husband's (entireties) interest to the wife pursuant to the judgment of dissolution was equivalent to the defeasance of the husband's interest in the property which would have occurred had he predeceased his wife while the parties were still married.

In other words, Appellants had never levied execution upon their ju ment, hence the judgment had never attached to the husband's undivi one-half(½) entireties interest in the home. When the husband conv his entireties interest, the wife received the home free of the jud ment lien. (Emphasis added)

In the case at bar, Respondent, Colleen Merrill, was not aware that Defendant, Douglas Merrill, had not paid the materialme and sub-contractors on the Road Runner Inn, construction project; judgment existed at the time of the divorce conveyance. Responden had no interest in any other property to convey, in exchange, to De fendant. Nevertheless, although the Stipulation and Property Sett ment required Defendant to assume and pay all debts and obligation curred by the parties during the marriage, Respondent sold proper

she received in the settlement and used her own income as well to pay off as many of those debts as she possibly could. Defendant, Douglas Merrill, even then, could not fulfill his stipulated and decreed obligations. Clearly, the facts of the case at bar justify application of the Lieberman rule that the conveyance of an undivided joint property interest from one divorcing spouse to the other, pursuant to a court approved property settlement, vests the property in the grantee free of any unexecuted judgment lien.

It cannot be said that the tremendous labor Respondent, Colleen Merrill, expended in constructing the home for her family amounted to a lack of consideration for the conveyance. It cannot be said that the eight years Respondent worked to help support the family amounted to a lack of consideration for the conveyance. It certainly cannot be said that an equity valued at even less than the minimum homestead exemption was a disproportionately large amount to settle upon a divorcing wife with custody of two minor children after twenty years of marriage. The evidence in the trial court was clear and satisfactory that Respondent, Colleen Merrill, accepted the conveyance of Defendant's interest in the family home in good faith and not to hinder or defraud Defendant's creditors. Respondent entreats the Court to assure her that she and her children will no longer have to pay for Defendant's failure to pay his debts.

Appellants Road Runner and Smithson, like Colleen Merrill discovered too late that that Defendant, Douglas Merrill, lacked the ability to perform his contractual obligations. Appellants could have protected themselves by requiring a construction bond. Respondent,

Colleen Merrill, could do little more than free herself from the bonds of a costly relationship. To force Respondent and her two children out of the home she built for them would be to exact the final pound of flesh from a woman who has paid dearly already for her vows. The Court must affirm the conveyance from Defendant of his interest in the family home and real property to Respondent, Colleen Merrill as conclusive against Appellants Road Runner and Smithson on the grounds that, being part of the settlement of the divorce action between the grantor and grantee, the conveyance was for a fair consideration.

B. PRIOR TO THE CONVEYANCE FROM DEFENDANT, RESPONDENT POSSESSED AN UNDIVIDED ONE-HALF INTEREST IN THE FAMILY HOME BY VIRTUE OF HER STATUS AS JOINT TENANT.

An estate in joint tenancy is one held by two or more persons jointly, with equal rights to share in its enjoyment during their lives and having as its distinguishing feature the right of survivorship, or jus accrescendi, by virtue of which the entire estate, upon the death of a joint tenant, goes to the survivor free and exempt from all charges made by his deceased cotenant. 20 Am.Jur. 2d, Cotenancy and Ownership, Sec. 3, p. 94. One joint tenant has not, by reason of the relationship, any authority to bind his cotenant with respect to the latter's presumedly equal interest in the common property. Stark v. Loker et. al., 129 P2d 390 (Ca. 1942). Execution may be had upon the interest of one of the joint tenants while all joint tenants are alive, and upon purchase of the interest of one of the joint tenants at execution sale the joint tenancy is severed, and purchaser and other joint tenants "become tenants in common." Zeigler v.

Bonnell, 126 P2d 118 (Ca. 1942); Pepin v. Stricklen, 114 Cal. App. 32, 299. P. 557 (1931). The mere docketing of a judgment against a joint tenant does not effect a severance of the interest of such tenant. Musa v. Segelke & K. Co., 272 NW 657 (Wis. 1937). A tenancy by entireties resembles a joint tenancy; a tenancy by entireties can only be created between husband and wife, however.

The Lieberman case, supra, concerned the conveyance from a husband to his divorcing wife of his undivided one-half entireties interest in the family home pursuant to a judgment of dissolution of marriage. There, the divorcing wife received the property free and exempt from an unexecuted judgment lien that she did not know existed against the husband. The court believed that the conveyance;

> as equivalent to the defeasance of the husband's interest in the property which would have occurred had he predeceased his wife while the parties were still married.

The case at bar concerns a joint tencany, rather than a tenancy by entireties as in Lieberman. The facts are strikingly similar. Defendant, Douglas Merrill, conveyed his undivided one-half joint tenancy interest in the family home to his divorcing wife, Respondent, Colleen Merrill, pursuant to a court approved divorce property settlement. Respondent was not event aware of the possibility of Appellants' judgment against Defendant husband. Respondent therefore urges the Court to adopt the reasoning of the Florida Court and to declare that Respondent received the home free of any potential judgment lien that might have arisen because of Defendant's inability to perform his contractual obligations.

C. CONVEYANCE TO RESPONDENT OF HOMESTEAD PROPERTY INTEREST

EXEMPT FROM EXECUTION CANNOT BE ATTACHED BY CREDITORS.

On April 12, 1976, Defendant, Douglas Merrill, was entitled to claim out of his undivided one-half joint tenancy interest in the family home a homestead exemption in the amount of $6,700.00 ($4,5 head of family; $1,500.00 spouse; plus $1,200.00 two other memebers the family). Utah Homestead Act, Section 28-1-1 et. seq., Utah Code Annotated, (1953).

> The homestead exemption provided for .... is not strictly an estate or property passing to those who are under the law entitled to enjoy it, but rather a protection to them in its enjoyment against the demands of creditors. If the estate is solvent and there are no creditors, no protection is needed.... Knudsen v. Hannberg, 8 U 203, 30 P 749 (1892).

Failure to make a homestead declaration does not impair the homestead right, so long as evidence shows that spouses were residents of the state when the conveyance was executed and continued to reside therein, that husband owned no other land and that the family did or did not include children. Williams vs. Peterson, 46 P2d 674 (Utah 1935). In that case, the husband executed a Promissory Note and Mortgage in her favor to compensate her for her share of money held in joint account that he was investing in business. Creditors sued to set aside the mortgage alleging a fraudulent conveyance. The trial court failed or refused to make any findings with reference to whether or not the mortgaged property was exempt from execution under the homestead law. The Court stated that:

> if the property was exempt it is wholly immaterial so far as the (creditor) is concerned whether or not there was any consideration for the mortgage.

The Court noted in addition that:

> upon the failure of the husband, he being the judgment debtor, to claim and select a homestead, it is the privilege of the wife to do so.

Accordingly, the Court upheld the wife's claim of homestead in her husband's undivided one-half interest in their jointly owned farm.

Similarly in Smith v. Popham, supra, the grantee of land which was the grantor's homestead, who never claimed, was entitled to raise the homestead exemption as a defense to a suit to set aside conveyances on the ground that they were made to defraud creditors. In that case, as in Leiberman, supra, the Oregon Court ruled that the grantee of the homestead took the property free of the creditor's judgment, unless the grantor had lost his homestead exemption such as by abandonment.

An owner of homestead property exempt from execution may convey it to anyone, including his wife, without having to conveyance overthrown as defrauding his creditors, provided he makes the proper defense when such transaction is assailed. Cardon v. Harper, 151 P2d 99 (Utah 1944). In Stearns vs. Stearns, 126 NW 2d 124 (S. Dak. 1964), an assignment to the divorced wife of possession of the homestead was proper in order to provide a home for the minor children. That one has conveyed property in fraud of creditors does not prevent him from claiming it as a homestead; such right being for the benefit of the family, cannot be frittered away even by the head of the family. Payson Exchange Savings Bank v. Tietjen, 225 P 598 (Utah 1924). The homestead claim provided for in Article XXII Section 1 of the Utah Constitution may be made at any time before sale or execution. Utah Builders' Supply Co. v. Gardner, 42 P2d 989 (Utah 1935); Kimball v.

Salisbury, 17 U 381, 53 P 1037 (1898); Folsom v. Asper, 25 U 299, P 315 (1903).

In the case at bar, Defendant, Douglas Merrill, was a resident of the State of Utah at the time of the quit-claim deed to Respondent, Colleen Merrill, Defendant owned no other lands in which to claim the homestead exemption; the family included two minor children. The trial Court made no express finding with respect to the homestead exemption to which Defendant was constitutionally entitled. Nevertheless, such finding is implicit in the trial court's conclusion that the said transfer by quit-claim deed of the home and real property from Defendant, Douglas Merrill, to Respondent, Colleen Merrill, was not a fraudulent conveyance. (Amended Conclusion of Law No. 6) Evidence revealed that the house appraised for $38,000.00 at the time of the conveyance. First, second, and third deeds of trust encumbered the property in the amount of $25,348.00. Existing liens totaled $1,540.00. The unencumbered equity held in joint tenancy, therefore amounted to $10,112.00. Respondent by virtue of her undivided one-half interest claimed an equity valued at $5,056.00; Defendant similarly claimed an equity valued at $5,056.00. The homestead exemption of $6,700.00 to which Defendant was entitled exceeded the value of the equity he conveyed. The interest Defendant, Douglas Merrill, transferred to Respondent, Colleen Merrill, was exempt from execution. Clearly, the Court must affirm the conveyance from Defendant, Douglas Merrill, of his interest in the family home and real property to Respondent, Colleen Merrill, as conclusive against Appellants Roadruner and Smithson.

POINT II

EVIDENCE IS INSUFFICIENT TO SHOW THAT CONVEYANCE WAS MADE WITH INTENT TO HINDER, DELAY OR DEFRAUD APPELLANTS.

Where the Supreme Court finds that the prepoderance of the evidence supports the trial court findings, or has doubt as to where the preponderance lies, or finds that the evidence may slightly preponderate against the trial court's conclusion, but such preponderance may be offset by the trial court's better position to judge the credibility of the witness, the Supreme Court will not reverse. Boccalero v. Bee, et. al., 126 P2d 1063 (Utah 1942); Stanley v. Stanley, 97 U 250, 94 P2d 65 (Utah 1939). The Supreme Court makes considerable allowance for the advantageous position of the trial court in close proximity to the parties and witnesses, which provided a better basis for insight into the truthfulness of the testimony offered than is afforded by review of the record. Givan v. Lambeth, supra.

Appellants alleged in the trial court that the conveyance was not made for a fair consideration and that the conveyance was made with intent to hinder, delay and defraud them in the collection of their claim against Defendant, Douglas Merrill. Appellants had a full and fair opportunity to present their case. The honored and learned trial judge was not persuaded; the evidence failed to preponderate in favor of Appellants' allegations. Appellants maintain that the trial court erred in its determination; the facts on appeal do not support their contention that the conveyance by Defendant, Douglas Merrill, of his interest in the family home to Respondent, Colleen Merrill, was made with actual intent to hinder, delay or defraud Appellant Road Runner. The court should affirm the trial court's conclusion that "the

transfer was not a fraudulent conveyance". (Amended Conclusion of No. 6.)

A. EVIDENCE DISCLOSES NO FRAUD OR PARTICIPATION IN ANY FRAUD ON THE PART OF RESPONDENT.

An intent to delay or defraud a creditor is not to be imp from the execution of the deed; the cooperative fraud of the grantor and grantee together must be shown. Billings v. Parsons, 53, P 730 (Utah 1898).

In that case, debtor husband paid appellant a small sum fo wages due and on the same day gave the wife $100 worth of goods. Th following day, the husband executed a deed of assignment for the ben fit of creditors of the inventory of his store. Appellant as credit attacked the transfer of the $100.00 worth of goods to the wife as a concealment of assets. The source of the goods was not shown. The wife was in no way implicated in the husband's fraud. The Court rul that a fraudulent intent on the part of the grantor alone was not su ficient to avoid the transfer when no preference was made and where the grantee did not participate in the fraud. In Ogden State Bank v Barker, 40 P 769 (Utah 1895), the Court noted that if such preferenc were made with a fraudulent design, or with intent to hinder and del the appellant in his collection of the judgment, still, if the gran did not participate in the fraud or have any knowledge of it, the va lidity of the conveyance would not be affected.

The Court considered the innocence of the grantee in a mor recent case. In Boccalero v. Bee, supra, the Court decided in 194 a judgment debtor assigned his one-seventh interest in his father' estate to his sister. Cancelled checks dating back ten years esta-

lished that debtor owed his sister $3,600.00. The sister had no knowledge of her brother's financial difficulties at the time of the conveyance. The Court affirmed the trial court's determination that the conveyance was made in good faith, for sufficient consideration and without intent to defraud.

In the case at bar, the record discloses no fraud or participation in any fraud on the part of Respondent, Colleen Merrill. At the time of the conveyance, Respondent was not aware that Defendant, Douglas Merrill, had not paid materialmen and sub-contractors on the Road Runner Inn, Inc. construction project. The value of the interest conveyed to Respondent for the use and benefit of the minor children was less than the homestead exemption to which Defendant was then entitled. Defendant merely conveyed to Respondent value she had created clearly. Respondent sustained her burden as grantee to show the good faith of the transaction. The evidence is clear and satisfactory that the conveyance was made in good faith, for a sufficient consideration, and without intent to defraud.

B. WHETHER A CONVEYANCE IS MADE IN GOOD FAITH AND WITHOUT ACTUAL INTENT TO HINDER, DELAY OR DEFRAUD A CREDITOR IS DETERMINED BY THE FACTS AND CIRCUMSTANCES OF EACH CASE.

Another factor to consider in showing the grantee's good faith is whether with the consent of the grantee, the grantor treated the property as his own. Paxton v. Paxton, 80 U 540, 15 P2d 1051 (1932). In the instant case, Respondent, Colleen Merrill, had to obtain a restraining order to prevent Defendant, Douglas Merrill, from coming on to the premises. Clearly, Defendant did not have Respondent's consent to treat the property as his own, nor can it be said that Respondent held the property in secret trust for Defendant. The conveyance wears no badge

of fraud. Respondent's good faith cannot be denied. The evidence is insufficient to show actual intent to defraud.

Where the conveyance of real property antedates the judgme upon which a creditor seeks to levy, evidence is insufficient to sh actual intent to defraud. Hillstead v. Leavitt, 475 P2d 1017 (Utah 1970). There, the initial funds used to purchase real property had come from the sale of a violin owned by the wife. The husband and parlayed the initial investment into more valuable holdings through a series of transactions. Title was kept in the wife's name. In a later exchange of the Wyoming property for Utah property, the husba returned the interest that had been in his name to the wife. Credi obtained a judgment and alleged that the conveyance to the wife of interest temporarily held in the husband's name was made with actua intent to hinder, delay and defraud. The Court found the evidence sufficient.

In this case, the value created in the house through the of Respondent, Colleen Merrill, diminished. First, second, and thi deeds of trust severely reduced the equity. Defendant held an inter of $5056.00; this amount was even less than the $6,700.00 homestead exemption to which he was entitle. Defendant's involuntary return Respondent of that depleted interest fourteen months before Appella obtained judgment cannot be said to have been made with actual inte to hinder, delay, or defraud.

Where creditors have had an opportunity to protect themse in the event of debtor's default, the Court has considered this a mary fact. Givan v. Lambeth, supra. There, creditors sold a hea

auto dealership to debtor. Experienced businessmen, creditors retained a lien on the corporate stock in the event of default on promissory notes executed by debtor. Prior to the purchase of the dealership, debtor had executed a deed conveying his sheep ranch to his sons who had long operated it for him. Several months after the purchase of the dealership, debtor delivered and the sons recorded the deed. The dealership failed. When debtor defaulted, as creditors anticipated, they alleged that the conveyance of the ranch was fraudulent. The Court, however, found no badges of fraud. The evidence was sufficient to sustain a finding that the conveyance was not fraudulent.

Here, Appellants are experienced in business. Appellant Road Runner had first-hand knowledge of Defendant's financial problems; one of its officers was Defendant's friend who had obtained financing in his own name from American Savings, for Defendant, because Defendant had such a poor credit rating. Appellants had every opportunity to protect themselves in the event of Defendant's default. Respondent Colleen Merrill, did not even know that Defendant had not paid the materialmen and sub-contractors on the Road Runner construction project. It cannot be said that Respondent participated in any fraud in anticipation of which Appellent Road Runner could not have protected itself. Clearly, the evidence is insufficient to show actual intent to hinder, delay or defraud Appellants.

The Statute of Elizabeth, from which the Utah Fraudulent Conveyances Act is derived, was never intended to prevent a debtor from paying or securing his honest debts, or from doing equity and exact justice. Boccardo v. Beezley, supra. Defendant Douglas Merrill had an honest obligation to Respondent Colleen Merrill and the two

children remaining at home to provide support. In cannot be said t
Defendant's conveyance even partook of the nature of a voluntary tr
fer and is therefore subject to attack. Notwithstanding, Appellant
have provided no reason to doubt that the truthfulnéss of the testi
was so tinctured with perjury as to justify the rejection of it in
Smith v. Edward, 17 P2d 264 (Utah 1932).

The evidence is entirely insufficient to show that the co
veyance from Defendant Douglas Merrill, to Respondent Colleen Merri
was made with actual intent to hinder, delay or defraud. The Court
should affirm the conveyance from Defendant of his interest in the
family home and real property to Respondent, being part of the sett
ment of the divorce action between the grantor and grantee, as con-
clusive against Appellants.

CONCLUSION

On February 27, 1976, Respondent, Colleen Merrill, sued De
fendant, Douglas Merrill, for divorce and custody of two minor chil
Pursuant to a Stipulation and Property Settlement approved by the di
vorce court, Defendant quit- claimed his interest in the family hom
Respondent. At the time of the conveyance, Respondent was not awar
that Defendant had not paid the materialmen and subcontractors on
construction project for Appellant Road Runner Inn, Inc.

Respondent, Colleen Merrill, had labored two(2) years to
build the home at 2341 Neff Lane for her family. The home was hea
encumbered by first, second, and third deeds of trust and liens.
joint tenants, Respondent and Defendant each could claim an equi

valued at $5056.00. The homestead exemption of $6,700.00 to which Defendant was entitled exceeded the value of the equity conveyed to Respondent Utah Code Annotated, Section 28-1-1 et. seq. (1953).

On June 30, 1976, Appellants sued Defendant, Douglas Merrill, for breach of the construction contract. On August 15, 1978, the matter was tried before the Honorable James S. Sawaya, Judge. Appellants were awarded a judgment against Defendant in amount of $28,300.00. The learned and experienced jurist concluded that:

1) The transfer by quit-claim deed of the home and real property located at 2341 Neff Lane, Salt Lake City, Utah, to the Defendant, Colleen B. Merrill, from the Defendant, Douglas C. Merrill, on the 12th day of April, 1976, being part of the settlement of the divorce action between the grantor and grantee, was for a fair consideration. (Amended Conclusion of Law No. 5); and

2) The said transfer by quit-claim deed of the home and real property from Defendant, Douglas C. Merrill, to Defendant, Colleen B. Merrill, was not a fraudulent conveyance. (Amended Conclusion of Law No. 6).

In this appeal, Respondent, Colleen B. Merrill, pleads that the Court affirm the conclusions of the trial court and declare the conveyance from Defendant of his interest in the family home and real property to Respondent as conclusive against Appellants.

Respectfully submitted this 30th day of July, 1979.

DALE R. KENT
Attorney for Defendant-Respondent,
Colleen B. Merrill
660 South 2nd East
Suite 100
Salt Lake City, Utah 84111
Telephone: 534-1035

CERTIFICATE OF SERVICE

SERVED the foregoing Respondent's Brief by hand delivering two copies to the following:

Roger S. Blaylock, Esq.
MORRIS & BLAYLOCK
Attorneys for Defendant, Douglas C. Merrill
520 Kearns Building
Salt Lake City, Utah 84101

W. Waldan Lloyd
NIELSEN, HENRIOD, GOTTFREDSON & PECK
Attorneys for Plaintiffs-Appellants
410 Newhouse Building
Salt Lake City, Utah 84111

this 30th day of July, 1979.

VIRGINIA HAY